

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Lori Erickson

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Amy J. Chantry on July 8, 2014, at the Becker County Human Services Building, 712 Minnesota Avenue, Detroit Lakes, Minnesota. The hearing record closed on July 25, 2014, upon the filing of post hearing submissions.

Brian W. McDonald, Assistant Becker County Attorney, appeared for the Minnesota Department of Human Services (Department) and Becker County Human Services (County).

License Holder Lori Erickson (Erickson) appeared on her own behalf and without legal counsel.

STATEMENT OF THE ISSUE

Whether there is reasonable cause to believe that there is an imminent risk of harm to the health, safety, or rights of children in the license holder's care sufficient to allow the temporary immediate suspension of the family child care license to remain in effect pending the Commissioner's final order under Minn. Stat. § 245A.08.

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that the Department demonstrated reasonable cause to believe that there is an imminent risk of harm to the health, safety, or rights of children in Lori Erickson's care. Therefore, it is respectfully recommended that the temporary immediate suspension of the family child care license of Lori Erickson be **AFFIRMED**, pending the Commissioner's final order on a licensing sanction.

Based upon the evidence in the hearing record, the Administrative Law Judge (ALJ) makes the following:

FINDINGS OF FACT

1. Ms. Erickson holds a C-2 Group Family Child Care License and has been a licensed child care provider for approximately 22 years.¹

2. Ms. Erickson operates her childcare business out of the basement level of her home in Pelican Rapids, Minnesota. Ms. Erikson's daycare is supervised by Becker County Human Services, even though her daycare is located in Otter Tail County, because Ms. Erickson's husband is employed by Otter Tail County.²

3. On May 28, 2014, Monica Watson, a social worker with Clay County Social Services, picked up R.R. from Ms. Erickson's daycare to take R.R. to an appointment in Moorhead, Minnesota. R.R. is a two-year-old child who has been placed in child foster care. Before leaving, Ms. Watson informed Ms. Erickson that she would be returning R.R. to the daycare around 1:00 p.m.³

4. Ms. Watson returned R.R. to Ms. Erickson's daycare just before 1:00 p.m. Upon arriving at Ms. Erickson's daycare, Ms. Watson knocked on the outer door of the home. When Ms. Watson did not get a response, Ms. Watson knocked on the inner door. After getting no response, Ms. Watson entered Ms. Erickson's home.⁴

5. Upon entering, Ms. Watson noticed that all of the lights were off and the television was on quietly. Ms. Watson called out for Ms. Erickson several times. Ms. Watson discovered Ms. Erickson sleeping on a couch. Ms. Watson walked over to where Ms. Erickson was sleeping, and just before reaching out to shake Ms. Erickson's shoulder to wake her up, Ms. Erickson woke up startled to see Ms. Watson.⁵

6. Ms. Watson also observed N.D., a two-month-old infant, sleeping in a "bouncy seat" on the floor next to the couch Ms. Erickson was sleeping on. N.D. was covered with a blanket and had a pacifier in her mouth.⁶

7. H.R., a one-year-old child, was asleep and covered with a blanket on another couch in the same room.⁷

8. After leaving Ms. Erickson's daycare, Ms. Watson contacted Becker County Human Services to report that Ms. Erickson was sleeping while providing daycare, and failed to follow proper safe sleep protocols.⁸

¹ Testimony (Test.) of Lori Erickson; Exhibit (Ex.) 1.

² Test. of Monica Watson; Ex. 3.

³ Test. of M. Watson; Exs. 1 and 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

9. On June 2, 2014, Joni Wohlwend, a Becker County licensing social worker, made an unannounced visit to Ms. Erickson's daycare in response to Ms. Watson's licensing violation report.⁹

10. Ms. Wohlwend asked Ms. Erickson if Ms. Erickson had been sleeping while providing daycare the previous week. Ms. Erickson denied sleeping.¹⁰

11. On June 2, 2014, the Department issued an Order Temporary Immediate Suspension of Ms. Erickson's child care license based on Ms. Erickson's alleged failure to: (1) properly supervise children in her care, in violation of Minn. R. 9502.0315, subp. 29a; and (2) follow proper safe sleep protocols, in violation of Minn. Stat. § 245A.1435 and Minn. R. 9502.0425, subp. 9, on May 28, 2014.¹¹

12. At the hearing, Ms. Erickson testified that "to the best of her knowledge," she was not sleeping on May 28, 2014. Ms. Erickson admitted that N.D. was an infant, and that N.D. was asleep in a bouncy seat, and covered with a blanket in violation of Minn. Stat. § 245A.1435 and Minn. R. 9502.0425, subp.9.¹²

Prior Correction Order

13. On January 13, 2014, Barb Moser, a Becker County licensing social worker, made an unannounced visit to Ms. Erickson's daycare. Ms. Moser observed Ms. Erickson's failure to provide supervision for five children in care for approximately 12 minutes. The ages of the five children ranged from two years old to five years old.¹³

14. On January 13, 2014, Ms. Erickson was issued a Correction Order for failing to properly supervise children in her care in violation of Minn. R. 9502.0315, subp. 29a and 9502.0365, subp. 5, based upon Ms. Moser's observations.¹⁴

15. Ms. Erickson did not appeal the Correction Order. However, Ms. Erickson did attach a written explanation to the Correction Order. Ms. Erickson disputed the length of time that the five children were left unsupervised. According to Ms. Erickson she did not leave the children unsupervised for more than five minutes. However, Ms. Erickson did acknowledge that the daycare children were watching a movie while she went out to the workshop to show her nephew where he could find some tools.¹⁵

16. Ms. Erickson took corrective action and maintained appropriate supervision by agreeing that she would bring all the daycare children with her or carry a working baby monitor so she is able to hear the daycare children.¹⁶

⁹ Test. of Joni Wohlwend; Exs. 1 and 2.

¹⁰ *Id.*

¹¹ Order of Temporary Immediate Suspension dated June 2, 2014.

¹² Test. of L. Erickson.

¹³ Test. of J. Wohlwend; Exs. 1 and 3.

¹⁴ *Id.*

¹⁵ Ex. 3.

¹⁶ *Id.*

17. Ms. Erickson did submit a letter of support from Debbie Marty. Ms. Marty and her husband Marty Leslie provide foster care for five children who are enrolled in Ms. Erickson's daycare. Ms. Marty expressed that Ms. Erickson has taken good care of the children and that she has had no concerns with Ms. Erickson's care of the children.¹⁷

18. Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, and 245A.08.

2. If a license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program, the Commissioner shall act immediately to temporarily suspend the license.¹⁸

3. If a license holder appeals an order immediately suspending a license, the Commissioner shall request assignment of an Administrative Law Judge within five (5) working days of receipt of the license holder's timely appeal.¹⁹ A hearing must be conducted within 30 calendar days of the request for assignment.²⁰

4. Ms. Erickson received due, proper, and timely notice of the allegations against her, and of the time and place of the hearing.

5. The Department and the County have complied with all substantive and procedural requirements of rule and law.

6. Ms. Erickson's appeal of the Order of Temporary Immediate Suspension was timely, and this matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

7. When an Order for Temporary Immediate Suspension is appealed, the scope of the hearing shall be limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the Commissioner's final order under Minn. Stat. § 245A.08, with respect to a licensing sanction issued under Minn. Stat. § 245A.07, subd. 3.²¹

¹⁷ Ex. A.

¹⁸ Minn. Stat. § 245A.07, subd. 2.

¹⁹ Minn. Stat. § 245A.07, subd. 2a.

²⁰ *Id.*

²¹ *Id.*

8. The burden of proof in expedited hearings shall be on the Commissioner to demonstrate that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program, pose an imminent risk of harm to the health, safety, or rights of persons served by the program.²²

9. "Reasonable cause" means there exist specific articulable facts or circumstances which provide the Commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.²³

10. Minnesota Statutes section 245A.1435, Reduction of Risk of Sudden Unexpected Death in Licensed Programs, provides:

- (a) When a license holder is placing an infant to sleep, the license holder must place the infant on the infant's back, unless the license holder has documentation from the infant's physician directing an alternative sleeping position for the infant. The physician directive must be on a form approved by the commissioner and must remain on file at the licensed location.
- (b) The license holder must place the infant in a crib directly on a firm mattress with a fitted crib sheet that is appropriate to the mattress size, that fits tightly on the mattress, and overlaps the underside of the mattress so it cannot be dislodged by pulling on the corner of the sheet with reasonable effort. The license holder must not place anything in the crib with the infant except for the infant's pacifier. The requirements of this section apply to license holders serving infants younger than one year of age. Licensed child care providers must meet the crib requirements under section 245A.146. A correction order shall not be issued under this paragraph unless there is evidence that a violation occurred when an infant was present in the license holder's care.
- (c) If an infant falls asleep before being placed in a crib, the license holder must move the infant to a crib as soon as practicable, and must keep the infant within sight of the license holder until the infant is placed in a crib. When an infant falls asleep while being held, the license holder must consider the supervision of other children in care when determining how long to hold the infant before placing the infant in a crib to sleep. The sleeping infant must not be in a position where the airway may be blocked or with anything covering the infant's face.

²² *Id.*

²³ *Id.*

11. Accordingly, the law requires that licensed child care providers place infants to sleep on their backs in a crib that meets the requirements of Minn. Stat. § 245A.146.

12. Minnesota Rules part 9502.0425, subpart 9 provides, in pertinent part:

There must be a safe, comfortable sleeping space for each infant and newborn. A crib, portable crib, or playpen with waterproof mattress or pad must be provided for each infant or newborn in care.²⁴

13. A bouncy seat is not approved for sleeping an infant under Minn. Stat. § 245A.1435.

14. The Department has presented specific and articulable facts that Ms. Erickson violated safe sleep practices for an infant in her care when Ms. Erickson allowed an infant in her care to sleep in a bouncy seat while the infant was covered with a blanket in violation of Minn. Stat. § 245A.1435 and Minn. R. 9502.0425, subp. 9.

15. In addition to providing safe sleep conditions for infants, a licensed provider must provide adequate supervision of children in his or her care. A licensed provider must be the primary provider of care in the residence and the children must be supervised by the caregiver.²⁵

16. “Supervision” is defined in Minn. R. 9502.0315, subp. 29a, as follows:

“Supervision” means a caregiver being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child. For the school age child, it means a caregiver being available for assistance and care so that the child’s health and safety is protected.

17. The Department has presented specific and articulable facts that Ms. Erickson failed to adequately supervise the children in her program on May 28, 2014, in violation of Minn. R. 9502.0315, subp. 29a. By falling asleep, Ms. Erickson was not within sight or hearing of the children in her care and was incapable of intervening to protect the health and safety of the children. As a result, the Department has met its burden of proof in demonstrating that reasonable cause exists to believe that Ms. Erickson’s actions pose an immediate risk of harm to the health, safety, or rights of children served by the child care program while the Department is pursuing licensing sanctions.

19. The Memorandum below is incorporated herein by reference.

²⁴ Minn. R. 9502.0425, subp. 9.

²⁵ Minn. R. 9502.0365, subp. 5.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Human Services **AFFIRM** the Order for Temporary Immediate Suspension of Lori Erickson's Family Child Care License pending the Commissioner's final order regarding a licensing sanction under Minn. Stat. § 245A.08.

Dated: August 7, 2014

s/Amy J. Chantry
AMY J. CHANTRY
Administrative Law Judge

Reported: Digitally Recorded; No transcript prepared

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this Report to file Exceptions to the Report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue her final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, P.O. Box 64998, St. Paul, MN 55164, (651) 431-4319, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The scope of an expedited hearing on an appeal of an Order for Temporary Immediate Suspension is limited solely to the issue of whether the temporary immediate suspension of the license should remain in effect pending the Commissioner's final order regarding a licensing sanction under Minn. Stat. § 245A.08.²⁶ The burden of proof is on the Department to demonstrate that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule, or the actions of

²⁶ Minn. Stat. § 245A.07, subd. 2a.

other individuals or conditions in the program, pose an imminent risk of harm to the health, safety, or rights of persons served by the program.²⁷

The Department has provided specific and articulable facts which provide the Commissioner with reasonable suspicion that there is an imminent risk of harm to the safety of the children served by Ms. Erickson's child care program. By her own admission, Ms. Erickson disregarded safe sleep regulations by allowing N.D. to sleep in a bouncy seat while N.D. was covered with a blanket, in violation of Minn. Stat. § 245A.1435.

A licensed provider must be the primary provider of care and is responsible for supervising the children in her program. "Supervision," by law, requires that Ms. Erickson be within sight or hearing of the infants, toddlers, and preschoolers in her care at all times so that she is capable of intervening to protect the children. The Department asserts that it has established by a preponderance of the evidence that Ms. Erickson was sleeping while Ms. Erickson was providing care for N.D. and H.R.

Ms. Erickson maintains that she was not sleeping and that she had placed "one child in a crib and was rocking another to sleep." The Administrative Law Judge does not find Ms. Erickson's argument supported by the record. At the hearing, Ms. Erickson testified that, "to the best of her recollection," she was not sleeping. Yet, Ms. Erickson now maintains in her closing argument that she put one child in a crib to sleep and she rocked another child. There was no evidence presented at the hearing to support Ms. Erickson's position. Instead, the record supports the Department's assertion that Ms. Erickson was sleeping based on Ms. Watson's observations. It seems highly unlikely that Ms. Erickson would not have heard Ms. Watson enter the daycare home or call out for Ms. Erickson if Ms. Erickson had been awake. Therefore, the Department has demonstrated by a preponderance of the evidence that Ms. Erickson failed to adequately supervise the children in her care on May 28 28, 2014, in violation of Minn. R. 9502.0315, subp. 29a.

While the Department has established that Ms. Erickson violated the safe sleep requirements in Minn. Stat. § 245A.1435 and Minn. R. 9502.0425, subp. 9, and the supervision requirements of Minn. R. 9502.0315, subp. 29a, a violation of the rules or law is not, in itself, sufficient to sustain a temporary immediate suspension. The Department also has the burden to establish that such violation poses an imminent risk of harm to the health, safety, and rights of the children in Ms. Erickson's care while disciplinary action is pending. By use of the word "pose" or "poses" (present tense) as opposed to "posed" (past tense), the legislature intended that the hearing be a forward-looking hearing, reviewing whether there is an immediate risk of harm if the childcare license is reinstated pending the issuance of the Commissioner's final order. The emphasis of this analysis is on the continuing nature of the risk and the immediacy of the risk presented; not whether the act or violation, itself, posed a risk of harm at the time it was committed.

²⁷ *Id.*

Thus, May 28, 2014, is not the timeframe of the risk that is central to Ms. Erickson's appeal of an Order for Temporary Immediate Suspension. Rather, the proper temporal analysis is of the future: whether Ms. Erickson's actions or violation of Minn. Stat. § 245A.1435; Minn. R. 9502.0425, subp. 9, and 9502.0315, subp. 29a, present a continuing or on-going risk of immediate harm or imminent future danger. The narrow question presented at this proceeding -- an appeal of a Temporary Immediate Suspension Order -- is whether the violation is likely to reoccur or whether the conditions will continue so as to demonstrate an on-going risk of harm.

The Department has met its burden. Ms. Erickson's failure to provide adequate supervision of the children in her care on May 28, 2014, was not an isolated, but recurring event. On January 13, 2014, Ms. Erickson was issued a Correction Order for violating the supervision requirements outlined in Minn. R. 9502.0315, subp. 29a, and again on May 28, 2014, Ms. Erickson violated the same rule. Ms. Erickson's continued failure to maintain adequate supervision of the children in her care demonstrates a disregard of the licensing rules and laws designed to protect children in care. It is also concerning that Ms. Erickson failed to follow proper safe sleep protocols at the same time that she failed to maintain proper supervision of N.D. Ms. Erickson's actions could have resulted in very tragic consequences.

As a result, the Department has presented specific and articulable facts that Ms. Erickson's disregard for safe sleep practices for infants and her history of supervision failures poses an imminent risk of harm to the children in her care. The gravity and nature of those risks makes a temporary immediate suspension appropriate in this matter.

A. J. C.